AMENDED COMPLAINT
JURY TRIAL DEMANDED: YES

14 CV-6249CJS

Revised 03/06 WDNY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
FILED
OCT - 2 2014
MICHAEL J. ROEMER, CLERK
WESTERN DISTRICT OF NY

FORM TO BE USED IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983
(Prisoner Complaint Form)

All material filed in this Court is now available via the **INTERNET**. See **Pro Se Privacy Notice** for further information.

1. CAPTION OF ACTION

A. Full Name And Prisoner Number of Plaintiff: NOTE: *If more than one plaintiff files this action and seeks in forma pauperis status, each plaintiff must submit an in forma pauperis application and a signed Authorization or the only plaintiff to be considered will be the plaintiff who filed an application and Authorization.*

1. DAMIEN THOMAS
2.

-VS-

B. Full Name(s) of Defendant(s) NOTE: *Pursuant to Fed.R.Civ.P. 10(a), the names of all parties must appear in the caption. The court may not consider a claim against anyone not identified in this section as a defendant. If you have more than six defendants, you may continue this section on another sheet of paper if you indicate below that you have done so.*

1. ~~OFFICER MILLSPAUGH,Rochester P.D.~~
2. ROBERT SHOEMAKER,Assist. Dist. Atty.
3. CITY OF ROCHESTER,Municipal
4. COUNTY OF MONROE,Municipal
5.
6.

2. STATEMENT OF JURISDICTION

This is a civil action seeking relief and/or damages to defend and protect the rights guaranteed by the Constitution of the United States. This action is brought pursuant to 42 U.S.C. § 1983. The Court has jurisdiction over the action pursuant to 28 U.S.C. §§ 1331, 1343(3) and (4), and 2201.

3. PARTIES TO THIS ACTION

PLAINTIFF'S INFORMATION NOTE: *To list additional plaintiffs, use this format on another sheet of paper.*

Name and ~~Prisoner Number~~ of Plaintiff: DAMIEN THOMAS

Present Place of ~~Confinement &~~ Address: 83 Vernon Place,Upper Unit
Buffalo,New York 14214

Name and Prisoner Number of Plaintiff:

Present Place of Confinement & Address:

DEFENDANT'S INFORMATION **NOTE:** *To provide information about more defendants than there is room for here, use this format on another sheet of paper.*

Name of Defendant: OFFICER MILLSPAUGH

(If applicable) Official Position of Defendant: Rochester City Police Officer

(If applicable) Defendant is Sued in x Individual and/or ____ Official Capacity

Address of Defendant: 185 Exchange Boulevard,Rochester,New York 14614

Name of Defendant: ROBERT SHOEMAKER,ADA

(If applicable) Official Position of Defendant: Assistant Monroe County District Attorney

(If applicable) Defendant is Sued in x Individual and/or x Official Capacity

Address of Defendant: 47 S. Fitzhugh Street,Rochester,New York 14614

Name of Defendant: CITY OF ROCHERSTER, Municipal

(If applicable) Official Position of Defendant: Municipal Defendant

(If applicable) Defendant is Sued in x Individual and/or x Official Capacity

Address of Defendant: Monroe County Attorney's Office
Rochester,New York

NAME OF DEFENDANT: COUNTY OF MONROE,Municipal Defendant,Sued In Official Capacity Yes; and Individual CapacityYes.

ADDRESS: MONROE Court Attorney's Office, Rochester,N.Y.

4. PREVIOUS LAWSUITS IN STATE AND FEDERAL COURT

A. Have you begun any other lawsuits in **state or federal court** dealing with **the same facts involved in this action**?
Yes____ No x

If Yes, complete the next section. NOTE: *If you have brought more than one lawsuit dealing with the same facts as this action, use this format to describe the other action(s) on another sheet of paper.*

1. Name(s) of the parties to this other lawsuit:

   Plaintiff(s): N/A

   Defendant(s): ____

2. Court (if federal court, name the district; if state court, name the county): ____

3. Docket or Index Number: ____

4. Name of Judge to whom case was assigned: ____

5. The approximate date the action was filed: ____________________

6. What was the disposition of the case?

Is it still pending? Yes____ No____

If not, give the approximate date it was resolved. ____________________

Disposition (check the statements which apply):

____ Dismissed (check the box which indicates why it was dismissed):

____ By court *sua sponte* as frivolous, malicious or for failing to state a claim upon which relief can be granted;

____ By court for failure to exhaust administrative remedies;

____ By court for failure to prosecute, pay filing fee or otherwise respond to a court order;

____ By court due to your voluntary withdrawal of claim;

____ Judgment upon motion or after trial entered for

____ plaintiff

____ defendant.

B. Have you begun **any other lawsuits** in **federal court** which **relate to your imprisonment**?

Yes____ No__X__

If Yes, complete the next section. NOTE: *If you have brought more than one other lawsuit dealing with your imprisonment, use this same format to describe the other action(s) on another sheet of paper.*

1. Name(s) of the parties to this other lawsuit:

Plaintiff(s): ____________________

Defendant(s): ____________________

2. District Court: ____________________

3. Docket Number: ____________________

4. Name of District or Magistrate Judge to whom case was assigned: ____________________

5. The approximate date the action was filed: ____________________

6. What was the disposition of the case?

Is it still pending? Yes____ No____

If not, give the approximate date it was resolved. ____________________

Disposition (check the statements which apply):

____ Dismissed (check the box which indicates why it was dismissed):

____ By court *sua sponte* as frivolous, malicious or for failing to state a claim upon which relief can be granted;

____ By court for failure to exhaust administrative remedies;

____ By court for failure to prosecute, pay filing fee or otherwise respond to a court order;

____ By court due to your voluntary withdrawal of claim;

____ Judgment upon motion or after trial entered for

____ plaintiff

____ defendant.

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5. STATEMENT OF CLAIM

For your information, the following is a list of some of the most frequently raised grounds for relief in proceedings under 42 U.S.C. § 1983. (This list does not include **all** possible claims.)

- Religion
- Free Speech
- Due Process
- Equal Protection
- Access to the Courts
- False Arrest
- Excessive Force
- Failure to Protect
- Search & Seizure
- Malicious Prosecution
- Denial of Medical Treatment
- Right to Counsel

Please note that it is not enough to just list the ground(s) for your action. You **must** include a statement of the facts which you believe support each of your claims. In other words, tell the story of what happened to you but do not use legal jargon.

Fed.R.Civ.P. 8(a) states that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." "The function of pleadings under the Federal Rules is to give fair notice of the claim asserted. Fair notice is that which will enable the adverse party to answer and prepare for trial, allow the application of res judicata, and identify the nature of the case so it may be assigned the proper form of trial." Simmons v. Abruzzo, 49 F.3d 83, 86 (2d Cir. 1995). **Fed.R.Civ.P. 10(b)** states that "[a]ll averments of claim ... shall be made in numbered paragraphs, the contents of each of which shall be limited as far a practicable to a single set of circumstances."

Exhaustion of Administrative Remedies

Note that according to **42 U.S.C. § 1997e(a)**, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prison er confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

You must provide information about the extent of your efforts to grieve, appeal, or otherwise exhaust your administrative remedies, and you must attach copies of any decisions or other documents which indicate that you have exhausted your remedies for each claim you assert in this action.

FACTS

1. On or about September ,2013,I was stopped in my vehicle by defendant Officer MILLSPAUGH of Rochester City Police Dept. Officer Millspaugh stated to me that I was driving with my headlights off. This was false and he knew this was false.

2. Officer Millspaugh then asked me to take a breathalyzer test. I declined to do so.

3. Millspaugh thereafter searched my car and claimed he found an empty alcohol bottle therein.

4. Millspaugh arrested me and charged me with DWI (Driving While Intoxicated). He did not charge me with having alcohol open in the car.

5. Millspaugh well knew that he had no basis for charging me with driving without headlights or DWI and yet he pursued and prosecuted me on such charges.

6. I was acquitted of both charges, DWI and driving without headlights.

7. Millspaugh arrested me without probable cause and thereafter maliciously prosecuted me knowing that the charges had no merit and were falsely made against me.

8. Millspaugh's malice is evident from the fact that he both fabricated the claim that I was driving without headlights on and the fact that he charged me with driving while intoxicated after he committed the illegal stop of my car based on his known false claim that I was driving without headlights on.These facts evince the requisite malice to state a claim for malicious prosecution when combined with the acquittals on both charges. Nieves v County of Monroe,761 F.Supp. 2d 48,52-53(WDNY 2011)

9. Defendant Millspaugh (1) initiated and continued a criminal proceeding against me; (2) which terminated in my favor by an acquittal; (3) and there was a lack of probable cause for commencing the criminal proceeding; (4) and actual malice motivated Millspaugh's actions. Murphy v Lynn,118 F.3d 938,947(2d Cir.1997)

10. DEFENDANT ASSISTANT DISTRICT ATTORNEY (ADA) SHOEMAKER adopted the acts of defendant MILLSPAUGH as shown by the following:

a. ADA Shoemaker continued the criminal proceeding against me after learning of the false claims of Millspaugh and the fact that I was acquitted of the charges of DWI and driving without headlights which formed the basis for the initial stopping of my vehicle by Millspaugh.

b. ADA Shoemaker initiated a criminal prosecution against me along with Millspaugh which charged me with Promoting Prison Contraband in violation of New York State Penal Law Section 205.20. ADA Shoemaker and Millspaugh both knew that no basis existed for charging me with Promoting Prison Contraband because the law was clear that since

I was being processed after the arrested by MILLSPAUGH and was not confined in a detention facility as defined under Penal Law 205.00 ("Detention Facility" means any place used for the confinement,pursuant to an order of a court") there was no merit to a claim that I promoted prison contraband.

c. ADA Shoemaker and Millspaugh knew that the claim that I possessed marijuana arose from the alleged finding of marijuana in my clothing during a stip search prior to any court involvement,arraignment,etc.and that this incident occurred on the very same date of my illegal arrest by Millspaugh.

d. By pursuing clearly meritless charges and ignoring the fact that I had been acquitted of the original charges of driving without headlights, DWI and also the Promoting Prison Contraband charge, ADA Shoemaker and Millspaugh maliciously prosecuted me.

e. In addition there City of Rochester and County of Monroe either have no policy against illegal searches and seizures that is written or they ignored such written policy as shown by ADA Shoemaker's disregard and condoning of the conduct of Millspaugh,thereby rendering the City of Rochester and County of Monroe liable. This evinces at least a deliberate indifference to the need for or existence of a written policy which renders the municipalities liable. City of Canton v Harris,489 US 378(1989); Doe v Calumet City,754 F.Supp. 1211,1223-1224(N.D.Ill).

f. The Supreme Court has held that a single municipal decision by a municipal's policymaker can under certain circumstances constitute a "policy". See Pembaur v City of Cincinnati,475 US 469,480, 106 S.Ct. 1292,1298(1986)

g. ADA Shoemaker is a municipal policymaker whose acts render the City of Rochester and County of Monroe liable as municipals. Pembaur v City of Cincinnati,supra.

11. In addition to the foregoing,I assert that the malice shown by Millspaugh and the malice shown by ADA Shoemaker when combined with the illegal search and seizure,the failure to take any corrective action and the pursual of clearly meritless charges which terminated in my favor by acquittals, are sufficient to support my claims of conspiracy and conspiracy to deny me equal protection of the laws.

12. The defendants combined their forces to charge and prosecute me with malice that can be inferred from the meritless and known false charges of Promoting Prison Contraband,DWI and driving without headlights which all resulted in acquittals; and from the illegal search and seizure and unfair/disparate treatment of an African-American citizen by white law enforcement and prosecutorial officials.

13. There is a history of abuse and maltreatment of African-American citizens in the Cityof Rochester and the City and County of Rochester have had many lawsuits filed against them raising such racial claims against the police and prosecutorial authorities. During discovery proceedings in this case,I will request discovery of documents and conduct interrogatories to disclose the existence of such lawsuits and complaints in support of my claims of racism against the City of Rochester and County of Monroe and their respective law enforcement and prosecutorial officials.

14. In fact,the landmark decision in Dunaway v New York, 442 US 200 , 99 S. Ct. 2248(1979) originates from illegal police conduct which occurred in the city of Rochester. There have been many more incidents that have occurred in Rochester or Monroe County that I will more fully disclose during discovery proceedings.

15. Clearly,defendants intentionally confined me without my consent and without justification (Broughton v State,37 NY2d 451,456,373 NYS2d 87,83,93,cert. denied 423 US 929(1975)) on charges of driving without headlights, DWI and Promoting Prison Contraband. There was a lack of probable cause to arrest me on each of these charges as shown by the facts set forth hereinbefore. Singer v Fulton County Sheriff,63 F.3d 110,118(2d Cir.); Matthews v Cityof New York,176 F.Supp.2d 418,433-434(EDNY 2012).

16.Not only did defendants Millspaugh and Shoemaker lack probable cause to arrest me on charges of driving without headlights,DWI and Promoting Prison Contraband, but they also maliciously prosecuted me on these charges and resulted in my acquittal of each such charge.

17. The sole charge that I was convicted of was a driving while impaired charge that was not originally charged and that was not supported by any evidence: no breathalyzer test; no blood test; no physical evidence; and no evidence whatsoever. The prosecution pursued this charge maliciously after failing to succeed on the original charge of Driving While Intoxicated (DWI) which I was acquitted of as stated herein.

18. I did not plead guilty to any charge and was not charged with driving while impaired. Nor was I arrested on such charge. at the time of my arrest.

19. In addition,the driving while impaired charge was the tainted fruit of the illegal police stop of my car and the fabricated DWI charge as to which no probable cause existed.ADA Shoemaker pursued this driving while impaired charge maliciously while having full knowledge that I had been acquitted of the DWI charge that I was arrested on and knowing that driving while impaired was not a charge that I was arrested on. Shoemaker knew that I had been acquitted of the arrest charges and in fact Shoemaker himself fabricated the charge of driving while impaired and maliciously pursued it against me.

20. I lost income and my driver's license; was required to pay $750.00 and $225.00 to keep my driver's license;my car insurance rose; my preexisting condition of high blood pressure worsened because of the stress and worrying that I suffered; my liberty and freedom of movement were restricted by the arrest and subsequent conditions placed on me while awaiting trial from 9/4/2013 to 3/17/2014; I suffered great mental pain and stress and anguish from defendants' acts and conduct.

21. Defendants are all white law enforcement and prosecutorial officials who discriminated against me and denied me equal protection of the laws based on a class-based racial invidious discriminatoryy animus.

CLAIMS

22. Adopting all allegations set forth at paragraphs 1-21,supra, I make the following claims:

23. Defendants deprived me of rights secured under the Fourth Amendment. U.S.Const.Amend. 4; 42 USC 1983.

24. Defendants deprived me of equal protection of the laws. U.S.Const.Amend. 14; 42 USC 1983.

25. Defendants acted pursuant to a class-based,invidious discriminatory animus to deny me equal protection of the laws based on race. 42 USC 1985(3); U.S.Const.Amend.14.

26. Defendants maliciously prosecuted me. U.S.Const.Amend. 14.

27.Defendants subjected me to unlawful confinement.42 USC 1983; U.S.Const.Amend. 14,4.

28. Defendants neglected to prevent a known conspiracy to deny me equal protection of the laws despite having the duty and power to prevent same. 42 USC 1986.

29. Defendants have no written policy,or ignored such written policy,against illegal searches and seizures as shown by ADA Shoemaker's disregard of and condoning the illegal search and seizure conducted by defendant Millspaugh,thereby rendering the municipals City of Rochester and Monroe County liable based on deliberate indifference to the existence or need for a written policy. Pembaur v Cincinnatti,supra; City of Canton v Harris, supra; and other authorities cited herein.

30. The municipal defendants City of Rochester and Monroe County are liable under New York State law for the tort committed against me amounting to negligent and intentional infliction of injury on me. This court is requested to invoke its pendent jurisdiction. United States v United Mine Workers,330 US 258(1947)

A. FIRST CLAIM: On (date of the incident) SEE ATTACHED SHEETS FOR STATEMENT OF CLAIMS AND FACTS,

defendant (give the **name and position held** of **each defendant** involved in this incident) ______

did the following to me (briefly state what each defendant named above did): ______

The constitutional basis for this claim under 42 U.S.C. § 1983 is: SEE ATTACHED SHEETS

The relief I am seeking for this claim is (briefly state the relief sought): ______

Exhaustion of Your Administrative Remedies for this Claim:

Did you grieve or appeal this claim? ______ Yes X No If yes, what was the result? ______

Did you appeal that decision? ______ Yes ______ No If yes, what was the result? ______

Attach copies of any documents that indicate that you have exhausted this claim.

If you did not exhaust your administrative remedies, state why you did not do so: ______

A. SECOND CLAIM: On (date of the incident) SEE ATTACHED SHEETS,

defendant (give the **name and position held** of **each defendant** involved in this incident) ______ did the following to me (briefly state what each defendant named above did): SEE ATTACHED SHEETS

The constitutional basis for this claim under 42 U.S.C. § 1983 is:

The relief I am seeking for this claim is (briefly state the relief sought):

Exhaustion of Your Administrative Remedies for this Claim:

Did you grieve or appeal this claim? ______ Yes X No If yes, what was the result?

Did you appeal that decision? ______ Yes ______ No If yes, what was the result?

Attach copies of any documents that indicate that you have exhausted this claim.

If you did not exhaust your administrative remedies, state why you did not do so: EXHAUSTION NOT REQUIRED NOT A PRISON CASE.

If you have additional claims, use the above format and set them out on additional sheets of paper.

6. RELIEF SOUGHT

Summarize the relief requested by you in each statement of claim above.

1)compensatory damages of one hundred thousand dollars on each cause of action assessed against each named defendant in his individual capacity; 2)punitive damages of one hundred thousand dollars on each cause of action assessed against each named defendant in his individual capacity; 3) one hundred thousand dollars compensatory damages and one hundred thousand dollars punitive damages on each cause of action assessed against each municipal defendant; 4) that this court invoke pendent jurisdiction over state law claims of negligent and intentional infliction of injury and grant appropriate relief of punitive and compensatory damages against the munitipalities.

Do you want a jury trial? Yes_____ No_____

U.S. v United Mine Workers,330 US 258(1947)

5) such further reliefas deemed just,proper and equitable.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September ,2014
(date)

NOTE: ***Each*** *plaintiff must sign this complaint and must also sign all subsequent papers filed with the Court.*

83 Vernon Place,Upper Unit
Buffalo,New York 14214

Signature(s) of Plaintiff(s)